Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. ~~77-765~~ 77-766

SAMUEL G. ALBERT, M.D.,
Petitioner,

vs.

FIRST NATIONAL BANK AND TRUST COMPANY OF MARQUETTE, MICHIGAN, EXECUTOR OF THE ESTATE OF GEORGE ALBERT, DECEASED,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Michigan

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinions of the Probate Court and Circuit Court for Gogebic County are unreported (Petitioner's Appendix A).

The opinion of the Court of Appeals of the State of Michigan, as yet unreported, is set forth in Respondent's Appendix A. The Supreme Court of the State of Michigan denied leave to appeal with opinion (Petitioner's Appendix A).

JURISDICTION

1. The order of the Supreme Court of the State of Michigan denying leave to appeal was entered without opinion on July 7, 1977 (Petitioner's Appendix A).

2. An application for rehearing before the Michigan Supreme Court was denied on August 31, 1977, because Michigan General Court Rules 1963, 864.4, provides for the filing of such application only in opinion cases (Petitioner's Appendix A).

3. Respondent contends that the petition for writ of certiorari should have been filed within ninety days from the entry of the order of the Michigan Supreme Court dated July 7, 1977; and, therefore, said petition was not timely filed with this Court.

STATEMENT

The facts of the case are stated fully in the opinion of the Court of Appeals of Michigan (Respondent's Appendix A).

ARGUMENT

Respondent opposes the Petition for Writ of Certiorari for the reason that this controversy does not involve any issue arising under the Federal Constitution or statutes of the United States. The state court decisions rested solely on independent and adequate state grounds, and federal questions were neither raised nor decided.

Inasmuch as no substantial federal question is involved in this case, it seems almost superfluous to point out that the question now alleged was never properly presented be-

low. Petitioner claims that he was denied substantive and procedural due process because the probate judge was bias and partial. However, this issue was not a basis for his claim of appeal to the Gogebic County Circuit Court (Respondent's Appendix B), and was raised for the first time in the Michigan Court of Appeals (Respondent's Appendix A). In its opinion, the Court of Appeals held: "Plaintiff's second assignment of error that he was denied substantive and procedural due process by the alleged bias and prejudice of the probate court is not preserved for review." The Court of Appeals decision rested solely on issues of state law, and it is clear that no federal question was decided. Furthermore, Respondent would submit that the state grounds were sufficient to support the state court judgments and that a decision on the federal question of due process was unnecessary to the court's determination of the cause. This court has often held that it will decline to review state court judgments which rested on independent and adequate state grounds, even where these judgments also decide federal questions. This principle has been applied not only in cases involving state substantive grounds, but also in cases involving state procedural grounds. *Henry* v *State of Mississippi*, 379 US 443, 448; 85 S Ct 564, 567 (1965).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

KENDRICKS, BORDEAU, CASSELMAN AND ADAMINI, P.C.

By: ROBERT M. BORDEAU

128 West Spring Street
Marquette, Michigan 49855

RESPONDENT'S APPENDIX A

STATE OF MICHIGAN
COURT OF APPEALS

SAMUEL G. ALBERT,
Plaintiff-Appellant,
v.
FIRST NATIONAL BANK & TRUST CO. OF MARQUETTE,
Defendant-Appellee.

No. 22909

OPINION

(Filed January 7, 1977)

Before: M. J. Kelly, P.J., and J. H. Gillis and W. P. Hampton, JJ.

Per Curiam

Plaintiff appeals by leave granted from the circuit court's judgment, which affirmed the probate court's denial of plaintiff's claim in part against the Estate of George Albert for medical services rendered.

The facts as stipulated to by the parties can be summarized as follows:[1] George Albert of Ironwood, Michigan died testate after a prolonged illness on November 24, 1970. In September, 1971 the First National Bank and Trust Company of Marquette, Michigan was appointed administrator c.t.a. of the estate. Plaintiff, the son of the decedent and a medical doctor, thereafter filed a claim with the probate court for medical services rendered on behalf of

the decedent from December 22, 1969 to November 24, 1970.[2] The claim against the estate was for $42,006.75 which was derived by subtracting $26,876.12, representing payments received to date, from $73,882.87, the total amount claimed. The probate court established plaintiff's gross claim in the amount of $33,500 for all services rendered at $100 per day. The $26,876.12, representing the payments received by plaintiff during decedent's lifetime was credited against the $33,500, which resulted in a balance due to plaintiff of $6,623.88. The probate court disallowed plaintiff's claim for specific tests and services over $100 per day, room and board at $45 per day and out-of-pocket expenses for drugs. The circuit court on appeal, affirmed the decision of the probate court.

Plaintiff contends that the circuit court's order of judgment affirming the findings of the probate court is against the great weight of the evidence and contrary to the facts and therefore, clearly erroneous. Plaintiff claims that a verbal agreement was entered into between him and his father and that the terms of this agreement were that plaintiff was to be paid $100 per day for medical services rendered plus all specific amounts for special services[3] and $45 per day for room and board. The theory of plaintiff's claim was express contract. The probate court found an agreement for payment of medical services at $100 per day, but found no agreement for payment of special services and supplies above $100 per day. The circuit court after reviewing the facts and testimony, concluded that the trial court's finding of no contract for payment beyond $100 per day was not clearly erroneous.

In reviewing an action tried upon the facts without a jury, GCR 1963, 517.1 provides in part:

> "Findings of fact shall not be set aside unless clearly erroneous. In the application of this principle regard shall be given to the special opportunity of the trial court to judge the credibility of those witnesses who appeared before it."

Furthermore, it is a "recognized rule of law that where a trial court hears sharply conflicting testimony the court may properly choose which testimony it disbelieves" and "an appellate court ought not to disturb the lower court's decision of whom to believe." *First National Bank & Trust Co* v *Albert*, 66 Mich App 252, 265; 238 NW2d 827 (1975).

In the present case, each side offered conflicting testimony. The probate court found an agreement for $100 per day and therefore, found that plaintiff had carried the burden of proof by the preponderance of the evidence that an agreement existed between father and son. However, as to the other alleged terms of the agreement, the probate court found that plaintiff did not carry his burden of proof and held the agreement was limited to $100 per day. The probate court could properly choose to disbelieve the plaintiff and his witnesses concerning some of the terms of the agreement; especially where certain terms were arguably recollected after a change in circumstances. Although, the probate court's opinion lacked consistency at times, neither its findings of fact nor its decision was clearly erroneous. After a review of the entire record, we are not left with a definite and firm conviction that a mistake has been committed. *Tuttle* v *Department of State Highways*, 397 Mich 44, 46; 243 NW2d 244 (1976).

Plaintiff's second assignment of error that he was denied substantive and procedural due process by the alleged bias and prejudice of the probate judge is not preserved for review.

Therefore, the circuit court's judgment affirming the probate court's denial of plaintiff's claim in part is affirmed.

FOOTNOTES

[1] A more detailed description of the factual circumstances surrounding the present case appears in *First National Bank & Trust Co* v *Albert*, 66 Mich App 252; 238 NW2d 827 (1975).

[2] Medical services were rendered on behalf of decedent from December 22, 1969 to November 24, 1970 except for a three day period of May 10-12, 1970.

[3] These amounts were set by plaintiff as his charges. Some were for tests and outside services performed by others.

RESPONDENT'S APPENDIX B

STATE OF MICHIGAN — THE PROBATE COURT FOR THE COUNTY OF GOGEBIC

IN THE MATTER OF THE ESTATE OF GEORGE ALBERT, DECEASED.

CLAIM OF APPEAL

I, James M. Collins, respectfully represent that I am an attorney at law in the City of Negaunee and represent Samuel G. Albert, M.D., and that he is aggrieved by a certain order allowing claims by the acting Probate Judge, Michael F. DeFant, dated March 16, 1972.

WHEREFORE, on behalf of Samuel G. Albert, M.D., I hereby claim an appeal from said order for the following reasons and on the following grounds:

1. That the findings of the Probate Court are contrary to the facts and testimony presented in this cause.

2. That the said Dr. Albert had entered into a contract with his father for medical services and the testimony established that his father ordered his son paid for the services in accordance with the billings submitted by Dr. Albert.

3. That the Probate Court in this cause has refused to allow the same.

(s) James M. Collins

Dated: May 11, 1972.